EMPLOYMENT TRIBUNALS

Claimant: Ms A Clancy

Respondent: Poolside Manor Ltd

Heard at: Watford Employment Tribunal (in public; in person)

On: **31 January 2022**

Before: Employment Judge Quill (sitting alone)

Appearances
For the claimant: In person
For the respondent: Mr I Wheaton, counsel

RESERVED JUDGMENT

(1) Because they were brought out of time, the tribunal does not have jurisdiction to consider the claims for
  (i) breach of contract (notice pay, salary or holiday pay),
  (ii) breach of working time regulations (fail to pay in lieu of holiday entitlement on termination of employment),
  (iii) unauthorised deduction from wages (underpayment of contractual entitlement and/or entitlement under working time regulations or national minimum wage legislation)
  (iv) failure to provide statement of employment particulars

in relation to any of the following contracts:
  (v) Camp Work
  (vi) Reception Work
  (vii) After Schools Club work

(2) All complaints relating to the following contracts are dismissed
  (i) Camp Work
  (ii) Reception Work
  (iii) After Schools Club work

(3) The tribunal does not have jurisdiction to consider a breach of contract claim in relation to the graphic design work contract because that contract (even if it met the other relevant criteria, which has not been decided) had not ceased by 19 March 2020. Further, I do not give permission to amend the claim to add such a complaint.

(4) The claim presented on 19 March 2020 did not allege that the Claimant had a "holiday pay" claim based either on a failure to pay for time off taken as holiday or refusal to allow time to be taken as holiday.

(5) The tribunal does not have jurisdiction to consider a claim for failure to pay in lieu of holiday entitlement on termination of the graphic design contract because that contract (even if it met the other relevant criteria, which has not been decided) had not terminated by 19 March 2020. Further, I do not give permission to amend the claim to add such a complaint.

(6) The claim presented on 19 March 2020 did not allege that the Claimant had an unauthorised deduction from wages claim (and/or a claim relying on national minimum wage legislation) based on a failure to pay anything for periods after 30 September 2019. Further, I do not give permission to amend the claim to add such a complaint.

(7) The claim presented on 19 March 2020 does include an allegation that there has been an unauthorised deduction from wages (in around November or December 2019), being a failure to pay the sum of £68 to which the Claimant says she became entitled having been (she alleges) continuously employed for six months. If it does not include an allegation of failure to provide a statement of employment particulars for the graphic design work contract, then, to the extent necessary, I grant permission to amend the claim to include that allegation. Those complaints will continue to a full hearing (for which orders will be sent separately).

REASONS

Introduction

1. This was a public preliminary hearing was listed to determine the issues identified by EJ Allen

2. EJ Allen revoked her previous decision that the tribunal had no jurisdiction to consider any part of the claim, and replaced it with a decision that the ET had no jurisdiction to consider a claim of unfair dismissal as per section 98 ERA. That complaint was dismissed. EJ Allen's decision was that there would be a preliminary hearing to determine if the remaining claims are out of time.

3. She decided that the remaining claims were

   3.1 Failing to provide written statements of employment particulars

   3.2 Unauthorised deductions of wages, and

   3.3 Breach of contract

4. Thus if the Claimant sought to bring any other complaint, she needed to apply for permission.

5. In order to decide the time limit questions, I needed to decide some sub-issues, including:

   5.1 What contract or contracts existed between the Claimant and the Respondent?

   5.2 When did those contracts end?

   5.3 What payments were allegedly due to the Claimant under those contracts, and on which dates?

6. This hearing was not listed to determine any other preliminary issues, apart from time limits. In particular, it had not been listed to consider employment status as a preliminary issue.

7. The Claimant seeks to argue that her complaints include reliance on the National Minimum Wage legislation and/or holiday pay and/or allegations that she has an on-going entitlement to be paid from 1 October 2019 (eg based on average earnings), or that, in the alternative, permission to amend should be granted.

The Hearing and the Evidence

8. The hearing took place in person. I had a 259 page electronic bundle. I had a supplementary bundle of 276 pages.

9. I heard witness evidence from the Claimant and, for the Respondent, from Mr Alan Gallagher

Law

10. When a judge has to consider a request for an amendment, whether made by a claimant or a respondent, it is a matter to which judicial discretion applies. The judge must take into account all relevant factors and ignore all irrelevant factors. The ultimate test that the judge must perform is to decide whether the balance of injustice and hardship is in favour of allowing the amendment or of refusing it. Allowing an amendment for a claimant will almost certainly have at least some degree of injustice and hardship to the respondent. Whereas refusing to allow an amendment to the claim is almost certainly going to have some degree of injustice and hardship to the claimant. So as I say it is a case of looking at all the relevant facts and circumstances and weighing up the relative injustice and hardship and making the appropriate decision.

11. In Selkent Bus Company Ltd v Moore EAT/151/96, the employment appeal tribunal set out some of the matters which a judge should take into account. As was emphasised in Vaughan v Modality UKEAT/0147/20/BA by the Employment Appeal Tribunal.

   11.1 Firstly, Selkent is still good law and must always be considered.

   11.2 Secondly, Selkent did not purport to set down a checklist or algorithm that would supply the judge with the correct outcome, and nor did it contain an exhaustive list of the factors that might be relevant.

   11.3 As per Selkent, it is always important for the judge to consider the nature of the amendment application, time limit issues and the manner of the application and the timing and manner of the application itself. However, it is important to bear

in mind that doing so is merely part of the overall process of taking into account all relevant matters when deciding where the balance of injustice and hardship lies, and these factors are not, in themselves the test for whether to grant the amendment or not.

11.4 As per Selkent, the nature of the amendment, time limit issues, and timing and manner of the application are not the only things that might be relevant. What weight to give to each of those matters, as well as details of what other matters are relevant, depends on the specific circumstances of the particular case and particular application that is before the judge.

12. Section 97 ERA states:

97.— Effective date of termination.

(1) Subject to the following provisions of this section, in this Part “the effective date of termination”—

(a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires,

(b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect, and

(c) in relation to an employee who is employed under a limited-term contract which terminates by virtue of the limiting event without being renewed under the same contract, means the date on which the termination takes effect.

(2) Where—

(a) the contract of employment is terminated by the employer, and

(b) the notice required by section 86 to be given by an employer would, if duly given on the material date, expire on a date later than the effective date of termination (as defined by subsection (1)), for the purposes of sections 108(1), 119(1) and 227(3) the later date is the effective date of termination.

(3) In subsection (2)(b) “the material date” means—

(a) the date when notice of termination was given by the employer, or

(b) where no notice was given, the date when the contract of employment was terminated by the employer.

(4) Where—

(a) the contract of employment is terminated by the employee,

(b) the material date does not fall during a period of notice given by the employer to terminate that contract, and

(c) had the contract been terminated not by the employee but by notice given on the material date by the employer, that notice would have been required by section 86 to expire on a date later than the effective date of termination (as defined by subsection (1)), for the purposes of sections 108(1), 119(1) and 227(3) the later date is the effective date of termination.

(5) In subsection (4) “the material date” means—

(a) the date when notice of termination was given by the employee, or

(b) where no notice was given, the date when the contract of employment was terminated by the employee.

13. Insofar as it is relevant, section 23 ERA states:

(2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—

(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, …

(3) Where a complaint is brought under this section in respect of—

(a) a series of deductions or payments …

… the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

(3A) … section 207B (extension of time limits to facilitate conciliation before institution of proceedings) apply for the purposes of subsection (2).

(4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

14. Article 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 ("the Order") states:

Subject to articles 8A and 8B, an employment tribunal shall not entertain a complaint in respect of an employee's contract claim unless it is presented-

(a) within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or

(b) where there is no effective date of termination, within the period of three months beginning with the last day upon which the employee worked in the employment which has terminated, or …

(c) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within whichever of those periods is applicable, within such further period as the tribunal considers reasonable.

15. Regulation 14 of the Working Time Regulations 1998 ("WTR") says, in part:

14.— Compensation related to entitlement to leave

(1) This regulation applies where–

(a) a worker's employment is terminated during the course of his leave year, and

(b) on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13 and regulation 13A differs from the proportion of the leave year which has expired.

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

16. Paragraph 3 of Regulation 14 sets out the means of deciding what sum is due in lieu of holiday on termination of employment. Regulation 30 says, in part:

30.— Remedies

(1) A worker may present a complaint to an employment tribunal that his employer– …

(b) has failed to pay him the whole or any part of any amount due to him under regulation 14(2) ...

(2) Subject to regulations … 30B, an employment tribunal shall not consider a complaint under this regulation unless it is presented–

(a) before the end of the period of three months … beginning with the date on which it is alleged that the exercise of the right should have been permitted (or in the case of a rest period or leave extending over more than one day, the date on which it should have been permitted to begin) or, as the case may be, the payment should have been made;

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three or, as the case may be, six months.

17. Section 11(4) ERA sets the deadline for seeking a reference to a tribunal under section 11(1)(a) to be 3 months from the end of employment.

18. Section 207B of ERA and Article 8B of the Order and Regulation 30B of WTR are worded similarly, and each describes how time limits are affected by early conciliation. In summary:

    18.1 Where early conciliation commences after the time limit has expired, then the time limit is not extended.

    18.2 Where early conciliation commences before the time limit expires, then the Claimant will have at least a calendar month from then end of the conciliation ("Day B") to present the claim.

    18.3 In some cases, they might have longer than one month from Day B (the period from the day after conciliation starts until Day B is ignored when calculating the time limit).

Effective Date of Termination ("EDT")

19. The effective date of termination ("EDT") has to be determined in accordance with the statutory definition. An employer and employee cannot simply agree between themselves what the EDT is. See the Court of Appeal decision in *Fitzgerald v University of Kent at Canterbury 2004 ICR 737, CA*.

20. Similarly, the mistaken belief of one or both parties as to the correct EDT is not binding on an employment tribunal.

21. The fact that the employee and/or employer believes that employment is continuing does not postpone the EDT if the termination of employment was objectively clear at an earlier date. *Avuru v Favernmead Ltd and anor EAT 0312/19*.

22. In *Robert Cort & Son Ltd v Charman [1981] I.C.R. 816* (a case decided under the predecessor to the Employment Rights Act 1996), the EAT considered the correct effective date of termination where an employer, in breach of contract, had purported to terminate the contract summarily (and had made a payment in lieu of notice). The EAT noted that the employer had been contractually obliged to give proper notice (and had not done so) and that the employee had stated that he did not accept that termination without notice was valid. For several reasons, including the need for certainty about when time limits expired, the EAT decided that the statutory definition of "effective date of termination" required the tribunal to treat the EDT as being the date on which the employer had unambiguously stated to the employee that it had summarily terminated the contract.

23. This case was approved by the Court of Appeal in *Radecki v Kirklees MBC [2009] I.C.R. 1244:*

> *37. Mr Cornwell referred us to Dedman's case, a decision of the Court of Appeal, and Cort's case, a decision of the Employment Appeal Tribunal (Browne-Wilkinson J presiding). The latter case applied the former and both are authority for the proposition that where an employee is dismissed summarily,*

the EDT of his employment for the purposes of what is now section 111 of the ERA is the date of the summary dismissal; and it makes no difference that the dismissal might have amounted to a repudiatory breach of the employment contract such that the employee might be entitled to bring a claim for damages in respect of such dismissal. It is worth quoting part of Browne-Wilkinson J's judgment in the Cort case, at [1981] ICR, 816 , 821:

49. The jurisprudence cited by Rimer LJ indicates that the effective date of termination should be freed of the niceties and uncertainties of contract law and its general requirement that, where there is a repudiatory breach, the contract nevertheless continues until that breach is accepted: see the discussion at Chitty on Contracts , 30th ed, 2008, Vol II , at paras 39-185 and 39-213/4. Thus, the effective date of termination will be the date of summary dismissal, as long as that is known to the employee.

24. In other words, the Court of Appeal made clear that if an employee did not know that he had been summarily dismissed (or purportedly so), then that would potentially be relevant to the EDT.

Reasonable Practicability

25. When a claimant argues that it was not reasonably practicable to present the claim within the time limit, there are questions of fact for the tribunal to decide. In other words, whether it was, in fact, reasonably practicable or not. The onus of proving it was not is on the claimant. When doing so, the phrase “not reasonably practicable” should be given a liberal interpretation in favour of the Claimant.

26. If the tribunal is satisfied that it was not reasonably practicable to present the claim within the time limit, then it is necessary to consider whether the period between the expiry of the time limit and the eventual presentation of the claim was reasonable in the circumstances. This does not necessarily mean that the Claimant has to act as fast as would be reasonably practicable.

27. The fact that an employee pursued an internal appeals procedure is a relevant circumstance which can, and should, be considered by the tribunal. However, generally speaking, it is not usually enough by itself to make it "not reasonably practicable" for the complaint to be presented within the prescribed period, even if the employer is slow to announce the outcome. See the Court of Appeal’s review in *Palmer and anor v Southend-on-Sea Borough Council 1984 ICR 372, CA*.

28. In *Porter v Bandridge Ltd 1978 ICR 943, CA*, the Court of Appeal held that the correct test is not whether the claimant knew of his rights but whether he ought to have known of them.

29. Similarly, when a claimant is ignorant about (or makes a mistake about) a fact which is relevant to the calculation of time limit, the question is whether that ignorance (or that mistake) is reasonable. The assessment of reasonableness has to take into account that a potential claimant ought to be aware of the importance of not missing a time limit. Put another way, even if it is true that the claimant did not know the true facts at the time of the dismissal, then that does not necessarily mean that it was not reasonably practicable to issue the claim in time. The claimant must also show that the ignorance was reasonable and that he could not reasonably have been expected to have discovered the true situation during the

limitation period. Furthermore, ignorance of the true facts must be the actual reason for failing to issue the claim sooner.

The Facts

30. The Claimant commenced ACAS early conciliation on 20 January 2020 and it ended on 20 February 2020 (so that was “Day B”). She presented her claim on 19 March 2020, meaning that it was less than a month after “Day B”. Furthermore, the ACAS early conciliation started less than 3 months from 21 October 2019, but not less than 3 months from 20 October 2019.

31. In Box 5 of the claim form, the Claimant ticked to say her employment was continuing. Similarly, in section 4 of the attached particulars of claim, she used the heading “employment on hold without pay”.

32. The Notice of Claim, including claim form, and response pack, etc, was sent to the Respondent by letter dated 30 March 2020.

33. Page 2 of the supplementary bundle contains a letter sent to the Claimant at the same address used by her on the claim form (and also for the purposes of ACAS early conciliation). It was not the same address supplied by the Claimant to the Respondent on the “schedule to fixed-term contract” (page 178) in May 2019, or used by the Respondent in the payslips for August to October (pages 124 to 126) (or indeed on the P45 mentioned in the letter). The letter, dated 16 April 2020, stated that the Respondent (Vicki Anderson, director was the signatory) had “just realised” that there had been an oversight and the Claimant had not been paid accrued holiday pay for “the period of employment from 7th May 2019 to 1st October 2019”. The Respondent’s position is that it had always regarded the Claimant’s employment as having ended with effect 1 October 2019 (as per the letter, or else as per 30 September 2019) and the oversight had been to fail to issue P45 (or any other document referring to end of employment) or to pay, on termination, in lieu of accrued but unused holiday. It argues the 16 April 2020 letter had nothing to do with the Claimant’s having issued employment tribunal proceedings, and was simply (as mentioned in the letter and amplified before me in oral evidence) because Covid, and specifically its intention to use the Coronavirus Job Retention Scheme (CJRS), had caused it to check its records as to which “current” employees it had and this had, in turn, led it to realise that the Claimant – who it did not regard as a current employee – had not yet had the formalities completed.

34. For the purposes of the decisions that I have to make, I reject the explanation that it was (only) work being done because of CJRS that led to the letter and that it was (entirely) a coincidence that it had received the ET1 a short time before the letter. Given that the letter used the address from the litigation, which was different to the address held in the payroll records, I am satisfied that the Respondent had received the ET1, noted that the Claimant was claiming to be an on-going employee (and that she was not being paid) and decided to send the letter of 16 April 2020 as part of its intended defence to the claim.

35. The Claimant did not receive the letter until around August 2020 as, at the time, her mother was living at that address (the address to which the letter was sent,

and which appears on the claim form) whereas she was living at another property (the address as per the payslips). Due to Covid restrictions, she was not regularly collecting her mail sent to the other address.

36. On 24 April 2020, the Respondent submitted its response to the tribunal which asserted that the Claimant was not an on-going employee (see, in particular, paragraphs 27, 28 and 35 of that document).

37. The Respondent operates a swimming tuition and activity centre. It provides a range of services including swimming tuition for children and adults, pool parties, training courses, children's multi activity camps, breakfast and after school clubs.

38. At various times, the Claimant did different types of work for the Respondent, which I will call “camp work”, “reception work”, “after schools club work” and “graphic design work”. The “graphic design work” was also referred to by the parties as “badge work”, although there is a dispute between them about the exact nature of what was agreed about the work which was to be done. In each case, the start of the contract was in 2019, and the end dates will be discussed below.

39. The Claimant entered a contract to do some camp work (as “camp leader”) in May 2019. The Claimant does not allege that there were any deductions for that time period. This contract ended when the Claimant performed the last duties under it, around 31 May 2019.

40. To the extent that the Claimant argues that this was an on-going contract, under which she was either allocated zero hours or some hours each week, I reject that argument. It was a one off contract for work on that particular camp for that particular period. It did not imply that, if the Respondent had a new camp in the future, the Claimant would necessarily be allocated work, even if work was available and even if the Claimant was willing to do it. Rather, each fresh camp was regarded as a fresh exercise, for which the Respondent decided what work it needed to have done, and sought expressions of interest. Thus 31 May 2019 was the effective date of termination for the first camp work contract.

41. In the summer holidays of 2019, the Respondent had some camp work available and made enquiries of the Claimant to seek to find out if she was interested. She intended to do summer camp work and (on her case) she agreed to do that. The contract (179 to 187) was dated 10 June 2019, and included a schedule of work for the 6 weeks from the week starting 22 July 2019 to the week starting 27 August 2019. On the Claimant’s case she attended ready to work on 25 July 2019, but was told that there was no summer camp work that day and she was told to go to reception instead and work there instead. The effective date of termination of the second (and final) camp work contract was (it seems to me) 25 July 2019, but, at the latest, it was 31 July 2019 when the Claimant was told by the director, Vicki, that there was no (further) summer camp work available.

42. The claimant also alleges that she had a reception work contract. She alleges that during May 2019 she did training for the reception work and should have been paid for that (under the reception work contract) and she was not paid for it. Furthermore, she alleges on 4 June 2019 she was instructed to (and/or agreed to a request from the Respondent) do some extra hours that day, for which she was

not paid. The Respondent alleges that the regular reception work was a fixed term contract due to end on 23 July 2019. The Claimant alleges that it was ended prematurely and she believes that the last regular shift she did under that contract was on 18 July 2019. She did some ad hoc reception work after that on 29 July 2019. Thus, on the Claimant's own case, it would seem to me that the effective date of termination of the reception work contract was 18 July 2019 (and that the ad hoc work on 29 July 2019 was a separate, one off, piece of work). However, at the latest, the effective date of termination for the reception work contract was 29 July 2019.

43. The alleged deductions in relation to the reception work contract relate to allegations that include the Claimant doing extra cover that she was not paid for, doing overtime that she was not paid for and training she was not paid for.

44. Furthermore she also she says that the respondent terminated the contract with effect 29 July and that (if I agree it has been properly pleaded, or else if I agree to allow an amendment) she is entitled to a finding of breach of contract (failure to give notice) in relation to the reception work contract. At Box 8.1 of the claim form, she had ticked the box for notice pay (as well as for holiday pay, arrears of pay, and other payments).

45. The Claimant also alleges that she had an after-school club contract. On page 176 of the bundle is a document which, on its face, says it is a fixed term contract for such work for the period 4 June 2019 to 23 July 2019. It says it is for 3 days per week, with the hours each day being 2 hours (or, if required, 2.5 hours). The Claimant does not allege that she worked on this contract on any dates later than 23 July 2019 (and, on the contrary, suggests it was terminated prematurely around 18 July 2019). She alleges unauthorised deduction from that contract as well. The effective date of termination of that contract was 23 July 2019, at the latest.

46. For these contracts, the agreement about when the Claimant was to be paid for the shifts/hours which she worked was:

    46.1 For regular, pre-planned hours (if any), the worker was paid in the same calendar month that the work was done, on the normal pay date, which was the last day of the month

    46.2 If extra or unplanned hours were done during the first three weeks or so of the month, then that payment for that time would be paid in the same month on the normal pay date, which was the last day of the month.

    46.3 Whereas if it extra or unplanned work was done in the last week or so of the month, then the payment would be made the following month again on the last day of that month.

47. Since all of the aforementioned contracts finished in July, it follows, therefore, that the latest date that any payment was due to be made (for normal wages, over time, additional work, et cetera) under any of those contracts was the last day of the following month, in other words, 31 August 2019.

48. On the Claimant's case, she was entitled to a payment in lieu, because she had taken no leave whatsoever during any of the contracts for camp work, reception

work or after schools club work. Her alleged entitlement is not an issue which I need to decide in relation to the preliminary issue which is time limit. [I have already mentioned that the Respondent's 16 April letter stated that the Respondent was making a payment for holiday pay.] A claim for holiday pay is included in the claim as presented.

48.1 My decision is that, if pursued as an unauthorised deduction claim (or breach of contract claim), the latest date by which the payment in lieu of unused holiday entitlement (if any) for those contracts is also 31 August 2019 (that is the normal pay date in the month following the termination of those contracts). I have not been shown any express agreement to the contrary.

48.2 If the claim is under the Working Time Regulations then would be from then the entitlement to payment in lieu crystalised on the effective date of termination of each contract (each of which is itemised above), the latest of which was – at the latest – 29 July 2019.

49. In relation to reasonable practicability, my finding is that the claimant has not put forward any good reasons for delaying presenting the claim in relation to the contracts for camp work, reception work or after schools club work.

50. I note that she thought that the amounts in question were small. I note that she has told me that she considered they might have been below the employment tribunal limits, but I am satisfied that it would have been easy for her to look into that. She does not suggest that there was anything preventing her looking into whether the amounts were actually below a hypothetical employment tribunal limit or to find out what the limitation date for making the claim was.

51. As I am about to discuss, there was another contract (graphic design), but it is my finding that the Claimant was not of the opinion that there was some connection between payments allegedly due to her under the camp work, reception work or after schools club work contracts, and the (allegedly on-going) other contract. She was aware that all of the camp work, reception work and after schools club work contracts had ceased, and she had all the information needed to find out whether that fact created a time limit for bringing an employment tribunal claim. Likewise, she knew she was not receiving any on-going payments under those contracts, and had all the information needed to find out whether that fact created a time limit for bringing an employment tribunal claim. To the extent that the Claimant alleges that she believed that, because (on her case) the money was owing to her, there was a fresh deduction each month when the payment was not made to her, then my decision is that that was not a reasonable mistake for her to make. She had the skills and abilities to do some research and find out that an alleged on-going failure to pay for work done in May, June and July 2019 was not an on-going series of deductions that continued any later than 31 August 2019.

52. A separate matter is that the claimant reached an agreement with the respondent that she would do some graphic design work for them. There is a dispute between the parties about whether that agreement was reached on 29 April (as the claimant alleges) or 4 June 2019 (as the respondent alleges).

53. The agreement was that the work would be done from home. The claimant points

out that the reason she was going to do the work at home was that the respondent did not have the relevant tools and equipment and she did. However, regardless of the reason that it was agreed that she would work from home.

54. It was also agreed that she would be paid via payroll. The claimant suggests that this was not necessarily agreed at the outset, but rather she was informed about this in August. The agreement was also that she would submit timesheets for the work that she did and be paid £8 50 per hour. Again, the claimant's position is that this was not agreed at the outset, but was agreed in August. I do not need to make any decision on that because the parties agree that (regardless of what prior negotiations and/or agreements there had been) by no later than August 2019 the agreed arrangement was that the claimant would be paid on the basis of timesheets which she submitted and at the hourly rate of £8.50 per hour and that the payments were to be made via the respondent's payroll function.

55. The respondent's position is that this should be treated as a fixed term contract which ended either 30 September 2019 or 1 October 2019. The claimant's position is that there was no end date and potentially the contract was to continue for as long as there was work for her to do and that she expected to be given various specific tasks in relation to the Respondent’s graphic design requirements.

56. Both parties agree that one thing which the respondent wanted the claimant to do was to create some new designs for characters which it could then put on certificates which it was to issue to students. The relevant certificates were to be completed by an authorised swimming instructor and there was different certificates for different levels of achievement.

57. Largely the parties also agree that it was made clear to the claimant that the respondent would need to have the new certificates and badges ready by what it called “badge week”, which was in the middle of November. They also agree that the badges, incorporating the claimant's designs were to be physically produced by an embroidery company and that it was necessary for the embroidery company to receive the designs a few weeks prior to badge week so that they could be physically created in time for “badge week”.

58. However, what is in dispute is that:

    58.1 on the respondent's case, there was a firm and specific deadline of 30 September 2019 for the claimant to get the graphic design work to the respondent so that the respondent could forward it to the embroidery company, promptly after that date, to leave enough time for the badges to be physically produced in time for “badge week”. Further, on the respondent’s case, the only work that had been envisaged under the graphic design contract was this badge work, and the design of a certificate which the Claimant had completed in June. The Respondent’s case is that the completion of that badge work task (and/or the deadline by which it had been agreed that task was to be completed) represented the end of a fixed term contract.

    58.2 on the claimant's case, it was she who was going to submit the work directly to the embroidery company, and she does not accept that any exact calendar date had been given as the deadline for doing that at the outset of the contract.

She does accept that she was notified of the embroidery company's deadline in due course. However, on her case, she had agreed that she would doing some ongoing graphic design work for the respondent, of which the badge work was only a part. She says that she regarded the notification of the embroidery company's deadline as being a shifting of priorities for her, but no more than that. That is, on her case:

58.2.1 it was not agreed at the outset that submitting the designs to the embroidery company was the completion of her "graphic design work" contract

58.2.2 when she was told about the specific deadline, there was not a mutual agreement that that date, and/or the completion of the task would be the end of the contract

58.2.3 when she was told about the specific deadline, there was communication to her by the Respondent that it was making a unilateral decision that that date, and/or the completion of the task would be the end of the contract

59. My decision is that there was not a fixed term contract for the graphic design work which had an end date of 30 September 2019 or 1 October 2019. Rather there was a loose arrangement reached in early June that the respondent might have several pieces of work which it wished the claimant to do. There was not an agreement that the Claimant would be on a "salary" or any other regular income. Rather, she was going to be paid, in relation to each task, for the time spent on that task. There does not seem to have been any fixed budget set by the Respondent for each task, nor any estimate supplied in advance by the Claimant for each task. Possibly (although it does not strictly matter to the preliminary issue) the two sides had very different expectations about how many hours the Claimant would need to spend on the work and (therefore) what the total cost would be. However, my finding is that, while the costs for each task were not thoroughly discussed in advance, it was discussed and agreed that

59.1 the Claimant would be paid an hourly rate for work done and

59.2 it was the Respondent which would tell her what the task was

59.3 it was the Claimant who would carry out the task and therefore (in effect) decide how many hours she needed to spend on it

59.4 it was not agreed that the Claimant would be paid for any time in which she was not performing the task

59.5 it had not been expressly agreed that, if the Respondent rejected the work it did not have to pay her, or if the Respondent thought the time claimed was more than it had expected, it did not have to pay her

60. It had not been expressly agreed what would bring the arrangement to an end. As I have mentioned already, I reject the Respondent's suggestion that there was an agreed fixed end date. However, by the same token, there was no agreement that there was an on-going commitment from either side. Although neither side expressly addressed their minds to it, it was obvious to both sides that, if there

came a time that the Respondent offered a piece of work to the Claimant, she was free to simply say “no” and that if there came a time that the Respondent wanted some graphic design work done, it could offer to anybody else, without being obliged to offer to it to the Claimant (first, or at all).

61. On 30 September 2019, the Claimant was told by the Respondent that the badge work been put on hold to (see page 168 of the supplementary bundle; part of an email which starts on 160 from Mr Gallagher to the claimant).

62. In relation to the argument that (regardless of whether a fixed end date was agreed or not) there was an agreement was that the graphic design contract would come to an end following completion of a specific task, my decision is that there was no clear agreement between the parties that, once the badge work was complete, then the Respondent would have no further graphic design work for her to do. While the Claimant may have been confident that (i) firstly she would do such a good job that they would be happy for her to do more work and (ii) that they did have further graphic design requirements, she knew that she was only entitled to be paid for work done and – therefore – once she had been paid for the work which she had completed, she would not be entitled to further payment unless and until (i) the Respondent allocated her more work and (ii) she had done (some of) that work and submitted a time sheet for it.

63. The respondent's case is that it was only ever intended that it would give the Claimant work to do on the design of a certificate (which they say was completed when submitted in the design for that in June) and work to do on the characters for the badges (which they say was completed when she submitted characters on 17 September 2019). However:

    63.1 Firstly, there was no agreement in advance about exactly what would constitute completion of the “task” (and therefore the contract) and

    63.2 Secondly, there was no communication by the respondent to the claimant that as far as it was concerned, the task was completed. On the contrary, my finding is that the correspondence sent by the Respondent at the time is that the claimant was been told that matters were being put on hold and that that carried the dual implication that (i) the work was not being treated as having already been completed and (ii) potentially, at least, there might be a resumption in the future. [On the latter point, the 30 September 2019 referred to the need to resolve other matters “first”, ie before a potential resumption. It is fair to say that there is, therefore, also an implication that, if the other matters are not resolved, there might be no resumption. However, that does not change the fact that, if the Respondent had regarded the task as already having been completed, there would have been no need to discuss the work being on “hold” or to discuss what needed to be resolved before the work resumed.]

64. In relation to the claimant's assertion that the claim form with attachments submitted 19 March 2020 includes a claim for unauthorised deduction from wages for this graphic design contract, my decision is that that is not the case. The claim form specifies that she was put on unpaid suspension are but does not allege that she was entitled to be paid during this period of suspension. As presented, the

complaint is a different one and is twofold, namely that the purpose of the suspension was to deal with her complaints about other matters in the respondent had been too slow in dealing with those and secondly that, for related reasons, she considered that the graphic design work should have resumed after much shorter interval. It is clear in the claim documents that she understood that she was not entitled to be paid during the suspension and she was not alleging that there were any arrears due to her. Amongst other things, she did not allege any method of payment calculation e.g. average wages or anything else for that matter.

65. In relation to the graphic design work, the claim does not include a claim for notice pay. The claim as presented makes clear that the claimant regarded herself and the Respondent as still being bound by the terms of the contract. She did not allege that it already terminated and did not that there should be an entitlement to notice pay because of termination.

66. In relation to holiday pay, for the graphic design contract, the claim does not contain an allegation about holiday pay in relation to the graphic design contract. The claim does not allege either that she took a period of leave that should have been treated as holiday and was not paid for it and does not allege that she requested holiday and had that request refused. Furthermore, there was no allegation that the contract had terminated and the respondent had failed to make a payment in lieu of accrued holiday upon termination.

Analysis and Conclusions

67. For each of the “camp work”, “reception work”, “after schools club work” the claims are out of time. The latest date that any payment was due under any of those contracts was 31 August 2019 and any claim for unauthorised deduction from wages had to be brought by 30 November 2019. Since the Claimant did not commence early conciliation prior to then the deadline is not extended by the early conciliation which commenced in February 2020.

68. For these contracts, the end dates were

    68.1 For the second (and final) camp work contract, 25 July 2019 (but, at the latest, it was 31 July 2019)

    68.2 For the reception work contract, 18 July 2019 (but, at the latest 29 July 2019)

    68.3 For the after schools club contract, 23 July 2019

69. Thus any claim for breach of contract, or under the working time regulations, or for written particulars, had to be presented by, respectively

    69.1 24 October 2019 (or, at the latest 30 October 2019)

    69.2 17 October 2019 (or, at the latest 28 October 2019)

    69.3 22 October 2019

    Since the Claimant did not commence early conciliation prior to any of those dates, the deadline is not extended by the early conciliation which commenced in

February 2020.

70. For all the claims under these contracts, it was reasonably practicable for the claim to have been presented in time, and time is not extended. The claims are dismissed because the tribunal does not have jurisdiction.

71. To the extent, if at all, that the Claimant seeks amendment to claim that she was paid less than the national minimum wage for any of those contracts, I do not allow the amendment. The claim was already out of time when presented. She could have included such a claim when presented in March 2020 but, more importantly, she could have presented them within 3 months (or, at least, started early conciliation within 3 months) of the termination date, and she did not do so. While it would be within my powers to allow an amendment, despite the fact it is out of time, I do not do so, as the injustice and hardship to the Respondent of allowing such an amendment outweighs that to the Claimant of refusing it. In reality, the factual allegations are no different than for the claim of unauthorised deductions which has been dismissed because it is out of time; that is the Claimant alleges that she attended work for more hours than she was paid for. It would not be in the interests of justice to amend the claim to add this out of time allegation.

72. The 16 April 2020 letter was sent. At the time that it was sent, the graphic design work contract had not been terminated earlier for any other reason. For the preliminary issue, I do not need to decide any issue under section 230(1) or (3) of the Employment Rights Act 1996 (ie whether it was an employment contract, some other type of worker contract, or neither). However, for time limit purposes, the contract had not ended. The effective date of termination (regardless of whether or not it was the type of contract to which the definition of that phrase in section 97 ERA had not occurred). The graphic design contract was not terminated prior to 19 March 2020, but rather it was "on hold".

73. The Claimant does not allege that, for actual work done under the contract, there is any outstanding payment due. Rather she accepts, that, for work actually done, the payment made on 31 October 2019 (payslip page 126 of bundle) represented the last instalment due. As far as the preliminary issue is concerned, if the Claimant had alleged that there was a shortfall for the payments for work actually done under the graphic design contract, and identified by the Claimant's correction of her timesheet, then the claim would have been in time. The last instalment was paid on 31 October 2019 and (because of early conciliation) claims for deductions (allegedly) made from payments lawfully due on or after 21 October 2019 would be in time.

74. The Claimant does allege (section 8 of her particulars of complaint) that she was due to receive a payment of £68 after "six months of continuous employment". Whether she had such an entitlement or not and whether she had "six months of continuous employment" or not, were not matters for me to decide as part of the preliminary issue. She relies on the written "after school club" contract document which is said to be for a fixed term from 4 June 2019 to 23 July 2019. However, her allegation is that this was also a term (whether express term or implied term is not something that I have to deal with) of the graphic design contract. I think it is appropriate for me to mention to the parties that I am far from convinced that this complaint has reasonable prospects of success. However, I am satisfied that the

Claimant was not simply suggesting in the claim documents that this was an unauthorised deduction based on the “after school club” contract, but rather was an entitlement to be paid £68 because the graphic design contract was on-going. Regardless of whether the 6 months is alleged to start running form May 2019 (earliest work done under any of the contracts) or from the start of the graphic design contract itself, the entitlement to payment (and therefore the date of the alleged deduction) was not until after 21 October 2019, and so the claim is in time.

75. I note that EJ Allen’s judgment of 27 August 2021 decided that the claims included a claim for failure to provide written particulars. This allegation included the graphic design work contract.

76. In relation to the 16 April letter, the claimant had not made any arrangements for her mail to be forwarded to her and she did arrange to visit the address to collect the mail. Upon receipt of the payment from the respondent, she did not contact the respondent to ask for an explanation. She did not ask her mother if any letters from the respondent had been received which might have explained the payment (purportedly in lie of holiday) which she knew she had received.

77. My finding is that the letter received at the address to which it was posted not long after 16 April 2020. Given the tight lockdown restrictions that were in place at the time, and the claimant's mother's circumstances, it was not unreasonable that the claimant did not immediately (meaning within a day or two) obtain a copy of the letter and read it or have it read out to her over the phone.

78. However, among the options open to the claimant were for her to visit the address without going inside and - by prior arrangement - have her mother leave the mail outside a short time before the Claimant’s arrival. (Eg when the Claimant was within sight of the front door). During lockdown this would not have been a breach of lockdown restrictions and during lockdown people did sometimes, for example, leave grocery for elderly friends or neighbours outside the property without mingling households.

79. Other options were for the letter to be read out to the claimant by phone by her mother or the Claimant to contact the respondent directly and ask for a copy to be emailed or posted to another address. The Claimant was particularly on notice after she noted the money was in her bank account (which I am satisfied would have been no later than the first week of May 2020). Furthermore, she should have been on the look out for tribunal correspondence sent to that address.

80. In all the circumstances, therefore I am satisfied that the claimant had had the reasonable opportunity by no later than 31 May 2020 to have read the respondent's correspondence. It was sent to her at the address she had put into the claim form and therefore that was a reasonable method for the Respondent to use to attempt to contact her.

81. Therefore my decision is that the effective date of termination of the graphic design contract was 31 May 2020. If the Claimant wished to make any claim based on that contract, of breach of contract (for notice pay or holiday pay or entitlements) or under working time regulations, the time limit for so doing was 30 August 2020. The time limit for any claim for unauthorised deductions (including a claim based

on an argument that the entitlement was to national minimum wage) would have had the clock start running from not later than 31 May 2020 also. The 16 April letter made clear that it was asserting that no further payments were due, other than the payment (for accrued holiday pay) which it was making and which the Claimant knew, by May 2020, had been received. The early conciliation between February and March makes no difference to time limit of 30 August 2020.

82. The Claimant wrote on 7 September 2020, stating that she would like to add a claim of unfair dismissal "and all the other breaches of contract". On her case, (i) she did this promptly after seeing the 16 April letter for the first time and (ii) the reference to unfair dismissal etc should be taken as a request to add a claim for notice pay, even though it is not expressly mentioned in such terms.

83. I do not give permission, in relation to the graphic design contract, to amend to add unauthorised deduction claim or national minimum wage legislation claim. Either such argument could have been expressly included in the March 2020 claim and was not included because, at the time, the Claimant accepted that she had no entitlement to on-going pay under the graphic design contract. She knew that the agreement was that she got paid for work allocated and performed, and that she had not (been allocated or) performed such work. The balance of injustice and hardship is in favour of refusing the amendment given the lapse of time since the contract was first agreed and the Claimant's failure to raise these arguments until much later.

84. I do not give permission to amend the claim to add a notice pay claim or holiday pay claim for the graphic design contract. I decided that the effective date of termination was 31 May 2020. On 2 June 2020, the Claimant received the response form, by email, and was aware from that date that the Respondent was alleging that her employment had terminated with effect from 1 October 2019. It was reasonably practicable for her to put in a claim (or amendment request, or to start fresh early conciliation, as the case may be) by 30 August 2020. She did not do so.

Employment Judge Quill

Date: 29 April 2022

RESERVED JUDGMENT &
REASONS SENT TO THE PARTIES
ON 4 May 2022

FOR EMPLOYMENT TRIBUNALS